

# INTRODUCTION TO A SOCIAL-FUNCTIONAL APPROACH IN THE INDONESIAN CONSUMER PROTECTION LAW

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## Abstract

*This legal study, using a social-functional approach, underscores the importance of developing a viable social consumer protection system. Through it the government should promote a more effective consumer protection system in which any obstacle hampering consumer's ability to obtain information necessary to make rational choices can be prevented. In short, a system protecting consumer's right to obtain information. In this context, business enterprises are still expected to participate and support consumer protection movements at the national as well as regional level in which the end goal is to develop a fair business competition climate.*

## Keywords:

*consumer protection, business competition, the right to information*

## Abstrak

Studi hukum ini, dengan menggunakan pendekatan sosial-fungsional, menggarisbawahi pentingnya pemerintah Indonesia membangun perlindungan konsumen sosial. Salah satu tujuannya adalah mempromosikan sistem perlindungan konsumen yang lebih efektif, yaitu dalam arti memberikan perlindungan terhadap gangguan kemampuan konsumen membuat keputusan masuk akal dan adanya informasi yang memungkinkan konsumen memutuskan pilihan secara wajar. Singkat kata, sistem yang ada harus menjamin hak konsumen untuk memperoleh informasi. Dalam konteks ini, pelaku bisnis sekalipun tetap terlibat dalam persaingan usaha ketat, diharapkan semakin terlibat dalam gerakan perlindungan konsumen untuk membangun iklim bisnis yang adil, tidak hanya di wilayah domestik suatu negara, tetapi juga untuk tingkat regional.

## Kata kunci:

Perlindungan konsumen, persaingan usaha, hak atas informasi

## Introduction

The Consumer Protection Act in Indonesia has been in effect for 18 years, but not much progress has been experienced by consumers, as evidenced by the still many violations of consumer rights, including the most basic rights, especially the right to obtain adequate and correct information. As a result of this violation,

consumers cannot make the right decision when they want to consume a certain product.

This stagnant condition can first be seen from the inaccuracies in the establishment and enforcement of the legal framework. Institutions created to support the protection of consumer rights are designed half-heartedly, with very limited authority. This situation will certainly be more profitable for business actors, so that the minimum consumer protection directly impacts on the unfair business competition climate in Indonesia. This is because conceptually, two areas of law, namely the law of consumer protection and competition law are positioned as two separate legal regimes. In fact, these two areas are inextricably linked with each other. The link between the dualism of regulation and policies to strengthen consumer rights in obtaining information is at the centre of attention in this paper. In this case, the authors introduce an approach called the social-functional consumer protection, which is assumed to be not yet well known in Indonesia. The question to be answered is what is the social-functional consumer protection approach? What is the theoretical basis for justifying this approach as applicable to consumer protection law in Indonesia?

To explain what the social-functional consumer protection approach is, the authors will begin the analysis of this paper with an explanation of the legal framework of consumer protection law and business competition law in Indonesia. After that, there is a discussion about the necessity of providing reasonable knowledge to consumers in general so that they are prevented from experiencing losses when transacting with business actors. The analysis will then arrive at a discourse about the social-functional consumer protection approach in an effort to unite the two legal regimes between the laws of consumer protection and business competition. The analysis used is entirely conceptual, with the aim of introducing a theoretical basis from the social-functional consumer protection approach. It should be pointed out that such an approach is not original from the authors since some aspects of the concept have been implemented in consumer protection law in Europe. Therefore, a referential study of the application of this approach in the European market is also part of the analysis of this paper. At the end of this paper,

conclusions and recommendations will be presented related to the importance of the Indonesian government to begin to establish a social consumer protection concept to develop a more effective consumer protection system in the country and other countries in the Southeast Asian region.

## **Result and Discussion**

### **1. Legal Framework**

In many countries the law on consumer protection is one of the most recently formulated regulations. In the United States, attention to consumer protection emerged in the 1960s, even though six decades earlier there were already several laws enacted to protect consumers. For example, in 1906, there were the Pure Food and Drug Act as well as the Meat Inspection Act, adopted after Upton Sinclair published his phenomenal book 'The Jungle'.<sup>1</sup>

In Indonesia, the development of consumer protection is even more lagging behind. The Indonesian Law Number 8 of 1999 on Consumer Protection (hereinafter referred to as Consumer Protection Act 8/1999) emerged when Indonesia was struggling with a severe economic crisis, resulting in the collapse of President Soeharto's government one year earlier. Vice President B.J. Habibie replaced Soeharto, who had been in power for 32 years. The draft of Consumer Protection Act, which had been put in place since the 1970s and had never been

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<sup>1</sup> Upton Sinclair wrote *The Jungle* to expose the appalling working conditions in the meat-packing industry. His description of diseased, rotten, and contaminated meat shocked the public and led to new federal food safety laws. Before the turn of the 20th century, a major reform movement had emerged in the United States. Known as progressives, the reformers were reacting to problems caused by the rapid growth of factories and cities. Progressives at first concentrated on improving the lives of those living in slums and in getting rid of corruption in government. By the beginning of the new century, progressives had started to attack huge corporations like Standard Oil, U.S. Steel, and the Armour meat-packing company for their unjust practices. The progressives revealed how these companies eliminated competition, set high prices, and treated workers as "wage slaves." The progressives differed, however, on how best to control these big businesses. Some progressives wanted to break up the large corporations with anti-monopoly laws. Others thought state or federal government regulation would be more effective. A growing minority argued in favor of socialism, the public ownership of industries. The owners of the large industries dismissed all these proposals: They demanded that they be left alone to run their businesses as they saw fit. See Constitutional Rights Foundation, Bill of Rights in Action, 'Upton Sinclair's the Jungle: Muckraking the Meat-Packing Industry,' Fall 2008 (Volume 24, No. 1), <http://www.crf-usa.org/bill-of-rights-in-action/bria-24-1-b-upton-sinclairs-the-jungle-muckraking-the-meat-packing-industry.html> (visited on April 28, 2018).

seriously considered, was finally enacted. This did not happen simply because the government was starting to care about consumer rights, but rather because of the insistence of international agencies, such as International Monetary Fund (IMF), that provided financial assistance to the government. One of the conditions of assistance provided was the necessity of having a consumer protection act.<sup>2</sup>

It is interesting that Consumer Protection Act 8/1999 was formulated in the same period as Law Number 5/1999 concerning Prohibition of Monopolistic Practices and Unhealthy (Unfair) Business Competition (hereinafter referred to as Antitrust Act 5/1999). Both acts were established by the House of Representatives through the right of initiative of this institution; a right that was never used during the New Order administration under then President Soeharto. There are many common terminologies and definitions in both acts. The term 'consumer' (*konsumen*) in Article 1 point 2 in the Consumer Protection Act 8/1999 and Article 1 point 15 in the Antitrust Act 5/1999) as well as the term 'business actor' (*pelaku usaha*) in Article 1 point 3 Law No. 8/1999 and Article 1 point 5 Law No. 5/1999), for examples, are introduced in both laws and very similarly formulated. Ironically, the existence of Law No. 5/1999 is not mentioned in Law Number 8/1999, although both acts are carried on at almost the same time. It is possible that this was due to the uncertainty which of these two acts should be passed first, so they did not refer to each other. Moreover, it can be found, that there is a certain unsureness on the dogmatic position of the consumer protection in relation to Antitrust Act.

As is the case with the consumer protection law, the business competition law can also be said to be rather late to develop in a country whose economic progress had been hailed as one of the 'Asian Tigers'.<sup>3</sup> In the Consumer Protection

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<sup>2</sup> W.A.W. Neilson, *Competition Laws for Asian Transnational Economies: Adaption to Local Legal Cultures in Vietnam and Indonesia*, dalam Tim Lindsey (ed), *Law Reform in Developing and Transitional States*, Routledge, New York, 2007, pp. 313-314.

<sup>3</sup> The term 'Asian Tiger' is commonly used by writers who see optimism in the economic progress of Asian countries. Indonesia was included in this group of countries, although later in 1997-1998, Indonesia experienced the height of the economic crisis. About this see: J.C. Davis & J.G. Gonzalez, *Scholarly Journal Articles about the Asian Tiger Economies: Authors, Journals and Research Fields, 1986-2001*, Vol. 17 No. 2, Asian-Pacific Economic Literature, 2003, p. 51-61.

Act 5/1999, the rights of consumers are regulated and on the other hand also about the obligations of business actors when dealing with consumers. Among these obligations, there are arrangements regarding the right of consumers to obtain correct and non-misleading information. However, there is still no clear demarcation between the business competition law (which is rather market related) and the consumer protection law (which is mostly part of the contractual obligations of business actors). Beyond these two laws, there are other arrangements in the codification of civil and criminal law. In the Civil Code, there are indeed numerous articles that contain protection for buyers of goods or services, with their protection subject to contract law or tort law. The provisions concerning tort law are contained in Article 1365.<sup>4</sup> Meanwhile, unfairness in business competition law can also be classified as a crime, and regulated in one article, namely Article 382-bis of the Criminal Code.<sup>5</sup> These two codifications are legal products inherited from the Dutch colonial era which are still in effect, even though in some parts they have been revoked, amended, or replaced by new regulations.

The mismatch between the Consumer Protection Act 8/1999 and the Antitrust Act 5/1999 marks a very basic foundation of thought: business competition law as market structure law is regarded as law between fellow business actors to protect business interest of competitors. In the consumer protection law on the other hand the protected subject is the consumer and this protection is obviously systematically seen by the Indonesian legislators as something separate from the business competition law. This seems not conform

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<sup>4</sup> Art. 1365 of Civil Code: *"A party who commits an unlawful act which causes damage and/or loss to another party shall be obliged to compensate therefore."* This article is interpreted broadly and used to allow a range of claims based on almost any violation of Indonesian law or imprudent behavior."

<sup>5</sup> Art. 382 bis of Penal Code: *"Those, who, with the aim of gaining, conducting, or expanding the results of trade or their own companies of companies of other persons, undertake unfair actions by misleading the public or certain persons, shall be liable, due to unfair competition, to imprisonment for one year and four months or to a fine of thirteen thousand five hundred rupiahs at the most, if such actions cause damage to competitors of such persons or competitors of such other persons."* This article has been in effect since 1920, so the fixed fine value continues to change, following the standards of prices over a certain period of time. The amount of fine imposed in Article 382 of the Penal Code is based on the Government Regulation in Lieu of Law No. 16 of 1960.

with the systematic connection between consumer protection and competitor protection: In fact, business competition is basically a competition to dominate the market by getting as many consumers as possible. On the other hand, one of the most important aspects of the protection of consumers is the protection against market conditions which enable misleading business activities to consumers or which otherwise harm the ability of consumers to decide free between competing offers in the market. Consumer protection law consequently has also a strong—and originally—business competition law dimension, which is rather referring to the market function of the consumer than to the contractual–individual–interest of the consumer.<sup>6</sup>

If at least this market relevant part of the consumer protection law codified in Law No. 8/1999 is systematically acknowledged as part of the business competition law, then the Indonesian legislators will have to define the term ‘consumer’ more exact than it is done in the recent law. If the legislators accept that certain case groups of consumer protection are not primary individual contractual interest protection, then it must be decided about a certain *reference consumer*. If reference consumer is the weakest consumer, we would have a rather protective social welfare concept. However, this concept may not be adequate to protect a workable competition. The purpose of the business competition law and of its consumer protecting part should be clearer defined than it is recently the case in point in order to understand the connection and the differences between market protection and social protection of consumers. Defining the goals of protection in various legislative areas may lead to different reference consumer definitions.

So first of all, an important task for the legal discussion in Indonesia would be to define the purpose of the unfair competition law and in special view of the consumer protection law. In a further step there can follow the decision on which consumer model is applicable, especially taking into account the very heterogeneous society in Indonesia. The Consumer Protection Act in Indonesia

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<sup>6</sup> See also: N. W, Averitt & R.H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, Vol. 65, 1999, *Antitrust LJ*, p. 713.

does not yet give clear answers to those basic questions. It does not separate between individual interests of consumers in an equilibrated contractual fulfilment (i.e. to get a product without material defects) and a social interest in undistorted decisions by the collective of consumers in the market. The neglect of these questions indicates there may be something wrong with the legislative concept of consumer protection in Indonesia.

Of course, there are various factors which can be identified as reasons for this. One fundamental factor which is important to point out may be the absence of systematically founded consumer protection concepts which are developed within a scientific discussion on the purposes of consumer protection law and on the integration of the consumer protection law into the general system of business competition law.

The Indonesian government is in a dilemmatic position in contributing to the enforcement of consumer rights: On the one hand there are as many as 250 million inhabitants who must be effectively protected as consumers and there is an economically important and steadily growing market area. On the other hand, the education level of the Indonesian citizens is not equally developed within Indonesia and the knowledge on consumers rights but equally the trust in the legal enforcement of the consumer protection law is in total relatively low.<sup>7</sup>

Therefore, awareness of the importance of protecting consumer rights is weak among the rather bad informed people and just starting to grow in the part of the Indonesian population which lives in big cities with broad access to modern media. The *National Consumer Protection Agency* (Badan Perlindungan Konsumen Nasional, BPKN) in Jakarta has not the power to effectively investigate and fine infringements of the Consumer Protection Act 8/1999, as it has only the task to

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<sup>7</sup> On the official website of the National Consumer Protection Agency (BPKN), there are no statistical data on incoming consumer complaints, even though an online complaint form is furnished. Data available in NGOs called the Indonesian Consumers Foundation (YLKI) did not appear until 2015, with a total of only 799 complaints, with the most cases being in the banking and housing sectors. This shows that Indonesian consumers actually do not have many alternatives to file a complaint. See Yayasan Lembaga Konsumen Indonesia (YLKI), "Bedah Pengaduan konsumen 2015," <https://ylki.or.id/2016/01/bedah-pengaduan-konsumen-2015/> (visited April 28, 2018).

*“provide suggestions and considerations to the government in the framework of developing consumers’ protection in Indonesia”* (Art. 33). Its further functions are under others to encourage the development of non-governmental consumer protection foundations (NGO-CP, Art. 34 lit. d), the contact with those non-governmental foundations, with entrepreneurs and with the public (Art. 34 lit. f) or—quite interesting as the idea of socialisation of the consumers interests in implemented here—to spread information through the media in order to socialise (*memasyarakatkan*) the interest of the consumers by taking their sides (Art. 34 lit. e).<sup>8</sup>

For cities at the district and municipal level, conform to Art. 49–58 Consumer Protection Act 8/1999, there are Consumer Dispute Settlement Agencies (*Badan Penyelesaian Sengketa Konsumen*, BPSK) that have been established. Those agencies have under others especially the task to handle and settle consumer disputes through methods of ADR such as mediation or arbitration (Art. 52 lit. a), to provide consultations (Art. 52 lit b) to receive complaints from consumers regarding infringements of consumers rights (Art. 52 lit. e), to monitor infringements of the Law No. 8/1999 (Art. 52 lit. c, d) and to impose administrative sanctions against entrepreneurs who have infringed the law (Art. 52 lit. m). The BPSK was designed as a small claim court. Unfortunately, up to 17 years after the enforcement of the Consumer Protection Law, there have been so far only 124 BPSKs established, but only half of them are being fully operated. This amount is far from being adequate, if only seen in terms of quantity as there are 514 regencies and municipals in the country. This cannot be enough to support the development of consumer awareness in Indonesia. Furthermore, there is a lack of trained and experienced experts to make the work of those bodies effective. The same happens to the Non-governmental Organisation on Consumer Protection (*Lembaga Perlindungan Konsumen Swadaya Masyarakat*, LPKSM). A provisional measure may be the promotion of educational activities of universities and other institutions as part of the social responsible self-

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<sup>8</sup> This provision shows clearly the rather individualistic approach of the Indonesian legislation in Law No. 8/1999 even regarding the rules on the consumer’s *right to be informed*.



understanding of some Indonesian universities in rural areas as we already can find in parts of Indonesia.

The weakness of the LPKSM is a clear example of the failure of developing countries such as Indonesia in the struggle for the interests of consumers in the midst of a business game that often deceives consumers. It is quite easy to establish formal bodies, such as BPSK, but the continuity of this institution is not properly maintained. Many regencies and municipalities refused to establish BPSK in their area due to worries of being unprepared for funding and facilities provision. Due to difficulties in this funding, the Minister of Trade issued Regulation No. 06/M-DAG/PER/2/2017 by stating that funding for BPSK was transferred from the regency/municipal budget now under provincial funding. That is, there is no obligation for each region/municipal to establish BPSK again. The need for establishment depends very much on the financial capacity of the province. Rules like this are of course contrary to the provision in Law No. 8/1999 on Consumer Protection. The dispute on the question which territorial administrative level should play a role in establishing and financing consumer protection agencies, demonstrates the poor condition of the consumer protection in Indonesia and the overall not effective enforcement of the Consumer Protection Law.

Weak coordination also occurs between the Supreme Court and BPSK regarding the authority to adjudicate cases of consumer disputes in credit agreements. The Supreme Court has several decisions that blame BPSK for expanding its authority to deal with consumer disputes due to the agreement on motor vehicle financing. The Supreme Court believes that this authority is under the general court, not under BPSK.

## **2. Consumer Protection Knowledge**

Consumers often find that they are not able to choose properly between offers in the market because they do not have sufficient knowledge of a particular product. In the age of information scattered in cyberspace, there is still no guarantee that the information will make consumers more well-informed or that the relevant information reaches the consumers. Apart of a certain `information

overload`, as the filtering of useful information from the vast amount of real and also fake information (i.e. in forums and blogs by influencers) needs a rather sophisticated consumer, commercial information is often misleading and unethical because in the reality of the Indonesian market are no sufficient instruments available to monitor the distribution of consumer relevant information. Article 17 paragraph (1) letter f in conjunction with Article 62 paragraph (2) of Law No. 8/1999 prohibit advertising which violates the advertising code of ethics, and violating those legal provisions, can be fined with criminal sanctions of IDR 500 million and/or imprisonment for a maximum of two years.<sup>9</sup> Unfortunately, there have never been consumers who fight for their rights to court by utilising these articles.

The practical experiences in Indonesia show that law enforcement in the field of consumer protection has not made much progress since the Consumer Protection Act came into effect. Institutions in the field of consumer protection do exist, but their existence does not support the strengthening of consumer rights. In fact, several court decisions have granted consumer claims, but their impact is not significant because these decisions are unable to change the behaviour of business actors in respecting consumer rights.<sup>10</sup> On the other hand, it is acknowledged that the courage of consumers to fight for their rights is very weak, partly because of the perception that the court is one of the most corrupt institutions in Indonesia.<sup>11</sup>

Each judge's decision only has a casuistic effect. Business actors consider that the verdicts punished them only apply to the related parties in the cases only.

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<sup>9</sup> Article 17 paragraph (1) letter f of Law No. 8/1999 states that advertising business actors are prohibited from producing advertisements that violate ethics and/or statutory regulations regarding advertising. This article is connected with Article 62 paragraph (2) which states that business actors who violate Article 17 paragraph (1) letter f can be sentenced to a maximum of two years in prison and a maximum fine of 500 million rupiah. Imposition of criminal sanctions for ethical violations is something of a breakthrough in this UUPK, even though eventually it is widely recognized as a formulation error.

<sup>10</sup> For example, the Decision Number 659 K/Pdt.Sus/2012 has sentenced Nissan Motor Indonesia because this company advertised and sold a fuel-efficient car to a consumer, but later the advertisement proved to be incompatible with reality.

<sup>11</sup> One non-governmental organization called Indonesia Corruption Watch (ICW) routinely reports corrupt behavior from judicial organizers in Indonesia. See the 2016 report via the link:  
<http://news.metrotvnews.com/read/2016/02/21/487706/modus-korupsi-di-lembaga-peradilan-mulai-dari-suap-hakim-hingga-menjadi-broker> (visited 12/20/2018)

Therefore, business actors who have been convicted to pay compensation to consumers, still maintain these inappropriate behaviours. They consider this to be safe by only paying to consumers as requested by the court, but they continue to continue the violation until later there are other consumers who sue them.<sup>12</sup> In the legal tradition in Indonesia, the decision of the previous judge is not binding on the judges who later to deal with similar lawsuits. The justice system in Indonesia does not recognise binding precedents, but only persuasive precedents. This condition has resulted in the consumer movement not achieving much progress in Indonesia, although there are few non-governmental organisations that have championed consumer rights since the 1970s, long before the Consumer Protection Act was enacted. In addition to internal factors of consumers, there are also external matters that cause consumer protection in Indonesia to be unable to move forward quickly.

Experience has proven that the consumer movement plays an important role in the growth of consumer attitudes to positively dare to fight for their rights. As currently used in the field of the psychology, the term '*attitude*' refers to a hypothetical construct, a predisposition to evaluate some object in a favourable or unfavourable manner.<sup>13</sup> So, attitude is the willingness to respond to a thing. The attitude of the consumer, thus, indicates the consumer's willingness to react in relation to his rights. According to *Triandis*, attitude is influenced by three components, namely: (1) cognitive component, i.e. one's knowledge of an object; (2) the affection component, i.e. the emotional connection to an object that can be perceived as favourable or unfavourable, resulting in positive or negative feelings

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<sup>12</sup> An interesting example is the decision of the parking case. The Supreme Court said the parking manager was responsible for the vehicle being deposited by consumers. The parking manager has argued that the parking agreement does not constitute an agreement for the storage of goods, but an agreement to lease parking lots. These decisions should make parking managers no longer write parking agreements to lease parking lots, but in reality they continue to do so without being affected by the court decisions. See among others decision of the Supreme Court No. 124 PK/PDT/2007 and Decision No. 2157 K/Pdt/2010,

<sup>13</sup> A.H. Eagly & S. Chaiken, "The Advantages of an Inclusive Definition of Attitude", Vol. 25, No. 5, 2007, *Social Cognition*, p. 582-602.

on an object, and (3) the behavioural component, i.e. the tendency to act, in accordance with cognition and his affection for his previous attitude.<sup>14</sup>

On the other hand, the social status of consumers has a key role for the determining attitudes. It is generally accepted that consumers with higher social and economic status would have more freedom in determining attitudes. Thus, there is surely a tendency that such consumers will be more courageous to fight for their rights compared with consumers living in weak social and economic status. Higher economic and/or social status lead to a higher status of education, as higher education usually is an expensive good in developing countries, and therefore to a stronger ability to handle information. Those determinants are significant especially for the current situation of the consumers in Indonesia as different levels of higher education as a privilege of higher social statutes separate the consumer groups in the respective parts of the society.

One of the consumer rights to be respected is the *right to be informed*.<sup>15</sup> However, the question of the adequacy and accuracy of 'information received by the consumers is a fundamental subject to scrutiny because most of the manipulation of consumer rights begins here. As the consumer is typically the weakest party in the B2C-relationship, it cannot be the consumer himself who is required to protect himself from manipulation by wrong, misleading or incomplete information or by aggressive marketing practices. The right of the consumer to be informed and therefore his sovereignty in the market must be protected and maintained by the law. On the other hand, there is the responsibility of the business actors to respect and support this consumer sovereignty. The business actor must provide information – maybe even in cases in which this information is not congruent with his advertising interest – and the law should ideally give incentives to the business actors to inform the consumer adequately or it must even force the business actors to do so. Consumers' interests, business

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<sup>14</sup> H.C. Triandis, *Attitude and Attitude Change*, John Willey & Sons, New York, 1971, p. 2-3.

<sup>15</sup> US President John F. Kennedy declared four basic consumer rights, i.e. the right to safety, the right to be informed, the right to choose, and the right to be heard. His speech delivered on March 15, 1962. Each year, the anniversary of the speech is celebrated as the world consumer rights day.

actors' interest and the public interest in the functioning of the market form a *triangular interdependent relationship*, which is the basis of the '*social-functional consumer protection*' concept being focused by this study.

If the social and economic status of consumers determines which attitudes and actions are generated by the consumer, then there cannot be a uniform reaction to the same information by all consumers. Any information provider will find it difficult to serve so many consumers of various social and economic statuses. For that reason, there would be the same standard of information presented to all consumers apart of certain cases in which traders address certain determined consumer groups. The standard in question is the degree of consumer knowledge in general, with average social and economic status, which is not too high, but also not too low. This notion of social and economic status also applies to educational levels, which means nor the particularly clever consumers, nor vice versa the particularly ignorant consumers can be the general standard.

The consumer situation within the Indonesian market can be described as very heterogenous. The middle class is just coming up and, so far, rather concentrated within the bigger cities. Those middle class and upper-class consumers are usually well educated and have a broad access to various information sources; they are accustomed to sophisticated product comparison. However, there is still a remarkable part of the Indonesian society which is not in the same situation like the critical middle-class consumers and which may need a higher protection level. This means a specific problem for the determination of the consumer standard which should be relevant for the determination of the protection level in Indonesia. While the Unfair Competition Law of the European Union is able to work with a hypothetical average reference consumer,<sup>16</sup> this may not be the right way for the recent Indonesian situation, as the aspect of protecting

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<sup>16</sup> See i.e. ECJ Case C-210/96 (1998) E.C.R. I-04657 - See also: G. Howells, "The Potential and Limits of Consumer Empowerment by Information", Vol. 32, No. 3, 2005, *Journal of Law and Society*, p. 349-370.

the weaker part of the society may be dominant due to the special social situation of the emerging nations in South East Asia.<sup>17</sup>

If we look at the advertising practices of the Indonesian media there is clearly a strong need to monitor and limit potentially misleading consumer information. Religious, expert and public authority play an important role in the advertisement landscape of Indonesia: The use of medical doctors as an advertising model i.e. is a common phenomenon in Indonesia.<sup>18</sup> These medical doctors fill out television shows featuring commercial healthcare products. They also often appear in advertisements for food or drink supplements on radio broadcasts. Even more, the symbol of the Indonesian Medical Doctors Association (IDI) has become an additional symbol attached to some consumer products, such as toothpaste. The use of public figures such as politicians is also an example for a common advertising model in Indonesia. A then Deputy Governor of the West Java Province i.e., who is also a senior film artist, regularly performs in commercial advertisements offering beverage products, even though he has occupied a leading position in provincial government. Even the former head of the Indonesian Constitutional Court did not hesitate to become an advertising model of electronic products. These examples are connected to the case group of commercial use of trust of the consumers to authorities or persons in public functions, which is a special case of potentially unfair consumer influencing, if there is no clear separation between the public function and the commercial activity. Likewise, clergies who used to give religious speeches, at the same time also use to be

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<sup>17</sup> H. Kharas, "The Emerging Middle Class in Developing Countries," *Working Paper No. 285, OECD Development Center*, January 2010. He defines a global middle class as all those living in households with daily per capita incomes of between USD10 and USD100 in PPP terms. By combining household survey data with growth projections for 145 countries, it shows that Asia accounts for less than one-quarter of today's middle class. By 2020, that share could double. More than half the world's middle class could be in Asia and Asian consumers could account for over 40 per cent of global middle class consumption.

<sup>18</sup> *The Indonesian Advertising Code of Ethics* (Etika Pariwisata Indonesia), III.2.14 says, "Professional services such as doctors, lawyers, notaries, accountants, etc. can only advertise about hours of practice or working hours, and change of address, in accordance with the code of ethics of their respective professions." Also in III.2.3.4 confirms that ads may not describe or create an impression of giving advice, recommendations, or information about the use of certain drugs by health professions such as doctors, nurses, pharmacists, laboratories, and representatives health profession, along with all attributes, as well as who connotes the health profession.

advertising models for various commercial goods and services. Their presence is sometimes only serving to accentuate the *halalness* of a product, regardless of the Indonesian Advertising Code of Ethics saying that '*halal*' should not be used as an object of advertising.<sup>19</sup>

Advertisement content should have its own gradation depending on the type of the product offered. If a product has a profound impact on health, for example, the information conveyed should be more detailed, but still presented in a standard of language that is understood by even rather lower educated consumers. Medical terms should not be intentionally used to deceive consumers into believing in product efficacy without being critical enough. Here also we may find, that an Indonesian normative reference consumer concept as a reception from the European Union Consumer Protection approach may have to be modified for the sake of the protection of weaker and lower aware consumers given the social damage misinformation in certain product areas (pharmaceutical products, food) may cause. In such areas by no means it can be adequate to set a reference consumer orientating towards the average urban consumer in Indonesia.

### **3. The Approach of Social-functional Consumer Protection**

The concept of social consumer protection is not easy to realise as there are other parties whose interests must be taken into account, namely the business actors and the public referring to the social function of competition. Any business actor can be a partner as well as an opponent of each other. Business actors are not simply dealing with consumers, but they also compete with other business actors. The way these business actors treat their business competitors, directly or indirectly affect the protection of consumer rights. In this point of view, there is at least – if not even a unity - a strong connection between consumer protection law and unfair (business] competition law. This connection is marking the part of the

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<sup>19</sup> *Id.*, III.1.2.3 point c. It is stated that in principle the word *halal* is not to be advertised. The use of the word "*halal*" in food advertising can only be displayed as a food label that includes a logo *halal* for products already obtained an official certificate from the Indonesian Ulema Council or institution authorized.

consumer protection law which is understood social-functional in contrary to the pure individual consumer protection.

Unfair competition law was originally meant to ensure fair conditions in a competition between competitors, thus protecting the individual competitors as well as the competition itself and its common interests. The protection of consumers was only a side effect of this final goal.<sup>20</sup> This mindset is still applied in the Indonesian legal system until the present day, as observed from the different arrangements of the two legal areas within two separate regulations, as well as the law enforcement agencies which are entirely unrelated to each other. However, when viewed from a number of definitions of legal concepts set out in the Indonesian Antitrust Act 5/1999 and in Consumer Protection Act 8/1999, there are some similarities. The terms '*consumer*' and '*business actor*' are both known in both Acts.<sup>21</sup> The phrases used to define both terms are similar. This demonstrates that the legislators were actually aware of the fact that these two Acts had a certain conceptual closeness. Merging these two legal areas into a single concept is not totally new in legal systems of other countries. The merger has also come to the unification of their enforcement agencies. For instance, Australia has the Australian Competition and Consumer Commission (ACCC). The ACCC promotes competition and fair trade in markets to benefit consumers, businesses, and the community. It also regulates national infrastructure services. In its official website, it is stated that ACCC's primary responsibility is to ensure, that individuals and businesses comply with Australian competition, fair trading, and consumer protection laws, in particular the *Competition and Consumer Act 2010*.<sup>22</sup> In the Indonesian context, an institution like ACCC does not yet exist. Currently there is a Business Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha*, KPPU) but its activities is not focussing immediate to the interests of consumers. On the other hand, there are institutions such as the NCPB, but the

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<sup>20</sup> P. Hajn, "Unfair Competition Law in the EU and in the Czech Republic (Paradoxes of the Current State and the New Trends)", Vol. 4, 2006, *Legal Studies and Practice Journal*, p. 387.

<sup>21</sup> See Article 1 point 5 and 15 of Antitrust Act 5/1999, and compare to Article 1 point 2 and 3 of Consumer Protection Act 8/1999.

<sup>22</sup> ACCC. <https://www.accc.gov.au/about-us>



function of this body is merely giving recommendations to the government. This body does not possess any authority of supervision, examination of cases, and imposition of sanctions. This task of handling cases is submitted to the CDSB as described previously. As a result of this dualism of arrangements, the protection mechanisms for the business competition are different from the mechanisms for the consumer protection. Although in KPPU's decisions, the interest of consumers is often mentioned, in practice, KPPU does not conduct *direct* supervision on business actors' behaviour toward consumers, unless it causes unfair competition which is detrimental to other business actors. Thus, there are no functions of those institutions setting the standard of consumer knowledge and consumer information.

Thus, the unfair competition law and the consumer protection law in Indonesia are still not considered as unity. The reason for this is to be found in the fact, that consumer protection is – compared to the competition law – a rather new concept in Indonesia, whereas i.e. in Germany it was developed partly out of the Unfair Competition Law. Another reason may be that there seems not to be a clear concept on the purposes of the several areas of law. Competition Law in general can be more market structure orientated (antitrust law) or more behavioural orientated (unfair competition law). Even if both areas should be considered as a unity in the sense that both are protecting the institution of the market competition, there is a categorial separation between those areas.

Systematically there is a separation between two categories of consumer protection: On the one hand there is a competition protecting consumer law, on the other hand there is a personal interest protecting consumer law. In the law of the EU the consumer protection is understood in a 'dualistic' sense: Several consumer protecting Directives of the European Community/European Union aim to protect exclusively consumers in their individual interest.<sup>23</sup> The purchaser

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<sup>23</sup> See Directive 85/577/EEC to Protect the Consumer in Respect of Contracts Negotiated away from Business Premises, 93/13/EEC on Unfair Terms in Consumer Contracts and Directive 99/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees. The in German law transferred rules on Consumer Contracts (§§ 312 ff. BGB) contain special provisions on off-premises contracts and distance contracts with consumers. The most

protection (warranty for defects) in the Civil Law is a typical contractual individual right of the purchaser arising from the synallagmatic duties of the seller.<sup>24</sup> In the Indonesian Law No. 8/1999 we find similar, non-market function orientated rules: Art. 18 is ruling provisions on standard clauses in contracts with consumers. Art. 8 shows that the Act may also aiming at the product safety as it is already forbidding to produce certain goods, including the duty to pull violating products from the circulation. Art. 19 contains the obligation of entrepreneurs to compensate consumers for damages arisen from the use of goods or services, which corresponds with a typical individual consumer right.

Those provisions are protecting the consumer in his purely individual interest. The consumer has an 'equivalence interest' in getting an adequate product for his payment. In certain situations, however, the relation between trader and consumer is not well equilibrated. In off-premises contracts the consumer could be surprised, molested or even threatened and he therefore may conclude the contract without enough consideration. In the situation of a distance contract as in online purchases the consumer cannot hold the product in the hand before buying it. He cannot evaluate the quality and the haptic of the product. On the other hand, the online trader has the advantage of lower trading costs compared to the traditional offline trade. This corresponds with the privilege of the consumer to be able to give the product back without any reason as we find it in the EU Consumer Protection Law.<sup>25</sup>

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important rule is the right of the consumer to withdrawal from the contract within fourteen days after the contract having been concluded or after the consumer has received the goods (§§ 355 ff. BGB). The rules on Purchase of Consumer goods (§ 474 ff. BGB) contain an important rule of shifting the burden of proof: *"If within six months after the date of the passing of the risk (that is the receiving of the product by the consumer) a material defect manifests, it is presumed that the thing was already defective when risk passed, unless this presumption is incompatible with the thing or of the defect."* (§ 476 BGB). For the distance contracts as typical in the e-commerce the risk will not pass to the consumer before the product is not received by him.

<sup>24</sup> In the German law this is not specifically part of the consumer protection law, because it is not a right exclusively of consumers but also of professional purchasers.

<sup>25</sup> Into national laws transferred EU-rules on Consumer Contracts (following the examples from the German Civil Code; §§ 312 ff. BGB) contain special provisions on off-premises contracts and distance contracts with consumers. The most important rule is the right of the consumer to withdrawal from the contract within fourteen days after the contract having been concluded or after the consumer has received the goods (§§ 355 ff. BGB). The rules on Purchase of

A different class of EU-consumer protection rules are the rules against aggressive and misleading commercial acts in the Business to Consumer-Competition (B2C). The B2C-Unfair Competition Law in Europe is fully harmonised by EU-Law. It is based on the EU-UGP-Directive from 2005.<sup>26</sup> This Directive is part of the Unfair Competition Law. In Germany it is integrated into the Law against Unfair Competition (*Gesetz gegen den Unlauteren Wettbewerb*, UWG). Besides the unfair commercial acts of the B2C-Directive the German UWG still contains a second class of forbidden commercial acts in its § 7 referring to harassment of market participants with special rules to protect consumers against harassment by traders. § 7 UWG plays a special role within the system of the unfair competition law as it has its reason in the protection of the privacy of the market participants and not in the fairness of the competition. Apart of § 7 UWG the provisions of the B2C-Directive are handling infringements against the consumer in its *function in the market process*. Therefore, they are not just handling cases in the individual interest of the consumers as contractual partners but they are referring to the general interest in a functional competition. However, the significance of the consumer protection as part of the protection of the fair competition is no longer limited to a *reflex* of the protection of the concurrents against unfair market behaviour. It is conceptual set to a parallel level of significance. Thus, with the consumer protection and the competitor's protection the unfair competition law contains *two sides which are of same importance*. Comparing this concept with the concept of the Indonesian Consumer Protection Act we find, that in Indonesia there is no clear differentiation between a

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Consumer goods (§ 474 ff. BGB) contain an important rule of shifting the burden of proof: "*If within six months after the date of the passing of the risk (that is the receiving of the product by the consumer) a material defect manifests, it is presumed that the thing was already defective when risk passed, unless this presumption is incompatible with the thing or of the defect.*" (§ 476 BGB). For the distance contracts as typical in the e-commerce the risk will not pass to the consumer before the product is not received by him.

<sup>26</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2005.149.01.0022.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2005.149.01.0022.01.ENG) (visited 12/20/2018).

competition law consumer protection and a contractual law consumer protection. The Act is mixing up both groups of rules, as we find the mentioned individually consumer protecting rules side by side with factually rather market orientated rules (Art. 9 -17 on misleading offers). In this context it is interesting that Art. 5 imposes *duties* also to the consumer, which are belonging rather to the contractual sphere.

#### 4. The Theoretical Basis

To understand the function of the competition law related consumer protection it is necessary to take a look on the development of the unfair competition law from an individually protecting law for traders to a social motivated market regulation instrument. In the German law tradition, the unfair competition law in the beginning of its development in the early 20th century was not more than a part of the individual personality law of the trader. The idea in the liberalistic economic and law system in Germany in the beginning of the 20th century was, that business activities are nothing else than part of the free personality in the economic surrounding. It was part of the individual right of the trader to do business. Josef Kohler wrote in '*Der Unlautere Wettbewerb*' (tansl. *The Unfair Competition*) edited in 1914:

“The contemporary economy, which makes that the individual as an individual is a self-deciding bearer of production and traffic, must be defined through the personality right. After this the economy is in an individualistic way free, but in that way, that the personality must not be touched. Any economic activity of the one has to keep itself within the limits, that is required by the personality of the other. The Personality of anyone however demands that he is not harmed or suppressed by misleading indecent means.”<sup>27</sup>

This is an individualistic view of competition protection. It focuses on the individual protection of the traders and of course does not yet consider the importance of a modern understanding of the purpose of the state in maintaining fair conditions for all market participants in a social-functional interest. This point of view in the beginning of the development of the unfair competition law is not

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<sup>27</sup> J. Kohler, *Der Unlautere Wettbewerb*, Rothschild, Berlin, 1914, p. 17. (translation by the author)

surprising as the unfair competition law – similar to the Indonesian law nowadays<sup>28</sup> - was developed out of the general tort law, namely § 826 BGB (intentional damage contrary to public policy), and the protection of the traders personality right.<sup>29</sup> However in a modern view the protection of the competitor is part of an *institutional protection of the competition*. A competitor has not an absolute subjective right to act economically in the market undisturbed by his concurrent.<sup>30</sup> Consequently infringements of the competitors' interest is not understood merely as tort law infringements.

The basic idea of the unfair competition law is, that a working competition is a main factor for a good distribution of welfare and therefore an important condition of an economic system which is socially equilibrated. The purpose of unfair competition law cannot be limited to the protection of fair market conditions in the interest of the traders. The significance of the consumer for the market process was nevertheless long time underestimated. The protection of the consumer was, if any, just a reflex of the protection of traders' interest. In the German and also in the European constitutional situation<sup>31</sup> this is not a possible concept: In the liberal economic system economy should work by the free play of competitive forces. This has not changed until now; it is part of the constitutional system i.e. in Germany with its guaranty of property (Art 14 Basic Law) and free profession (Art 12 Basic Law). The constitutional guaranties of the economic freedom however are delimited by the fundamental rights of others and by the *Social State principle* of Art. 20<sup>32</sup> and Art 28 Basic Law. The Social State Principle imposes a *constitutional commitment of the state to social justice*. The equilibrated relation between freedom guaranties and social justice leads to the idea of maintaining a system in which the self-regulating powers of the market are

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<sup>28</sup> Shidarta, "Hukum Persaingan Usaha" (*Business Competition Law*), dalam Shidarta, Abdul Rasyid, & Ahmad Sofian (ed), *Aspek Hukum Ekonomi dan Bisnis*, Prenadamedia, Jakarta, 2018, pp. 155-176.

<sup>29</sup> See Fezer in: K.H. Fezer (ed.), *Lauterkeitsrecht (UWG)*, Edition 3, C.H. Beck, Munich, 2015, § 1 recital 38.

<sup>30</sup> K.H. Fezer & S. Koos in *Staudinger BGB Internationales Wirtschaftsrecht*, 2015, recital 396.

<sup>31</sup> The Consumer Protection is one of the fundamental policies of the European Union regulated in the Treaty on the Functioning of the European Union (Art. 4 II lit. F and 169 TFEU).

<sup>32</sup> Art. 20 Basic Law: "The Federal Republic of Germany is a democratic and social federal state."

strengthened and in which state interventions are to be avoided wherever the self-regulation is working in a proper way. But the 'free play of forces' itself needs protection. If the market actors are able to influence their competition position by means which are not conform to a fair competition then the system comes to not well equilibrated conditions. The main purpose of Competition Law is to avoid distortion of competition in a *functional interest*, not in an individual interest. Actually, individual interests of the market actors in the unfair competition law are protected as reflex of the socially motivated regulation of the market behaviour. This refers also to the consumer protection in the Unfair Competition Law.<sup>33</sup> The purpose of the Unfair Competition Law cannot be restricted to a merely individual-rights protection. Unfair Competition Law and with it *especially* its consumer protecting part has to be understood generally as *social law*.

The relation between individual and social functions of the law<sup>34</sup> can be founded, based on the Theory of Fezer on the Subjective Right, in a *social law understanding of the subjective private rights of the law subject*. Subjective rights are expression and instruments of the freedom of the individual in the law. However, the freedom given by the subjective law to the individual is only one side. The second side is social responsibility that corresponds with the grade of individual freedom. This responsibility is proportionally higher the higher the freedom given to the individual is. This means participation in welfare and freedom are corresponding with responsibility.<sup>35</sup>

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<sup>33</sup> In the German unfair competition law consumers have no individual claim against infringements of the originally consumer protecting rules of the Act against Unfair Competition. This is controversial in the German academic literature. Activelegitimated are consumer protection associations. The enforcement of the law however is private in front of Civil Courts. In other memberstates of the EU the consumer protection is a purpose of authorities.

<sup>34</sup> See on the "polar" understanding of the legal purpose of the codified Unfair Competition Law as individual (entrepreneurial interest of the competitors) and collective (consumer protection) in the scandinavian law tradition. K.H. Fezer, "Die Generalklausel – eine Sternstunde des Lauterkeitsrechts in der Europäischen Union", in Hans-Jürgen Ahrens et al., *Festschrift für Wolfgang Büscher*, Wolters Kluwer Deutschland GmbH, Köln, 2018, pp. 279-310.

<sup>35</sup> K.H. Fezer, *Teilhabe und Verantwortung: die personale Funktionsweise des subjektiven Privatrechts*. Beck, München, 1986; about the Pluralistic Market Theory and the understanding of the competition as evolutionary process of a "responsible market economy" see K.H. Fezer in: K.H. Fezer (ed.), *Lauterkeitsrecht (UWG)* (2. Ed. Munich 2010), Einl. Rn. 277 ff.

The connection between individual freedom and social responsibility leads to a paradigmatically change in the understanding of the function of the Unfair Competition Law. Purpose of the Unfair Competition Law is not alone the protection of a private business interest. It partly still is protecting those private interest; in this sense Unfair Competition Law is still a part of the Private Law and this explains the private enforcement i.e. in the German law system.<sup>36</sup> But at the same time – and finally this is the characteristically aspect of the modern Continental-European Unfair Competition Law - Unfair Competition law has the purpose to protect *public interests in a functional competition*.<sup>37</sup> It has a functional purpose aimed to the undistorted market. Consequently, the Unfair Competition Law, which was initially developed out of the Immoral Damage in § 826 BGB as a part of the Civil Law institute of *bonos mores* (see § 138 BGB) cannot longer be understood merely as general Tort Law but must be understood as functional market law. Unfair Competition Law has a social-institutional function yet protecting *also* private interests of the competitors and the consumers. This concept of the Unfair Competition Law is based on the doctrine of *Eugen Ulmer*, who founded the model of the integration of consumer protection, general public interests and concurrent interests in 1931.<sup>38</sup> In 1955/1956 *Wolfgang Hefermehl* founded the doctrine of the protection of interests in the competition law (*Interessenschutzlehre*).<sup>39</sup> Following this doctrine the purpose of the Unfair Competition Law was no longer the protection of subjective rights but to react to

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<sup>36</sup> On the other hand there is a tendency in the EU-Antitrust Law to strengthen private law enforcement, see Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, [2014] OJ L349/1.

<sup>37</sup> § 1 UWG therefore says: “*This Act shall serve the purpose of protecting competitors, consumers and other market participants against unfair commercial practices. At the same time, it shall protect the interests of the public in undistorted competition.*” (translation published by Bundesministerium der Justiz und für Verbraucherschutz).

<sup>38</sup> E. Ulmer, *Sinnzusammenhänge im modernen Wettbewerbsrecht* (1932); see also E. Ulmer, “Wandlungen und Aufgaben im Wettbewerbsrecht.” *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)*, Mohr Siebeck, Berlin, 1937, 769 ff.; see on the development of the doctrine K.H. Fezer, in *Festschrift Wolfgang Büscher*, 2018, 297 ff.

<sup>39</sup> W. Hefermehl, “Der Anwendungsbereich des Wettbewerbsrechts”, in *Festschrift für H.C. Nipperdey*, München & Berlin, 1955, pp. 283 ff.

an infringement against objective norms of behaviour and therefore the protection of the competition as institution.<sup>40</sup>

## 5. Characteristic Aspects

The first aspect which characterises the social function of the unfair competition law is a '*socialisation*' of the individual economic interests of the market actors and an '*instrumentalisation*' of their interests for protecting the undistorted competition in the market.<sup>41</sup> It means, that the market participants – competitors on one side and consumers on the other side – are actually used as determining 'functions' in the competitive process in the interests of the general public in a workable competition. As it is the goal of the Competition Law to make the competition effective there is a general interest in setting incentives to offer preferably good products and services in the market. Those incentives should ideally arise out of the competition process itself rather than by legislative regulation. As market success is a strong incentive to the vendors and as market success is caused by demand the consumer preferences in the market can be used. Consumers are interested in good products, therefore they try to identify good products in the market. They are '*instrumentalised*' as '*performance identifiers*' in the market process. Seen in a collective sense the consumers choice is a function to set incentives to the suppliers. The consumers interest in getting favourable offers is here not just understood individually but it is understood functionally; *protection of consumer sovereignty in this sense is protection of the consumer in his function as a market 'decider'*.

The protection of the competitors' interest can be understood in an analogue functional way: Competitors have an individual interest in being protected against unfair market behaviour of other competitors. But in the unfair competition law their interest in offering preferably good products to the consumers is an institutional interest in protecting the workable competition.

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<sup>40</sup> K.H. Fezer, in *Festschrift Wolfgang Büscher*, 2018, 297, 298 on the reception of the *Interessenschutzlehre* in the European Law.

<sup>41</sup> S. Koos, "Proceedings of the International Conference on a Developing Legal System to Promote Social Welfare", August 23/24, 2017, Trisakti University Jakarta, p. 9.



Only if the consumers have enough sovereignty to identify good offers in the market the right incentives to the vendors are set. It is therefore in a social-institutional interest to protect the competitors against unfair market behaviour which prevents them from making favourable offers in the market. The competitors protection is – same as the consumers protection – instrumentalised. Consumer protection and competitor protection in the sense of the social-institutional concept of the Unfair Competition Law cannot be regarded as legal purposes isolated from each other. To the contrary, they influence each other: Consumer protection lies within the interest not only of the consumers and the public but also directly in the interest of the competitors as the undistorted consumers sovereignty is a condition for fair trade conditions in the market. Even if the European Union unfair competition law has recently implemented a certain dualism between consumer protection and competitors protection,<sup>42</sup> the conceptual connection between consumer protection and competitors' protection has not been changed.<sup>43</sup>

As a second aspect it has to be stated that, as consumer protection is the *direct and original* purpose of the unfair competition law and not merely an indirect effect of the protection of the competition in the interest of the competitors. The Consumer protection has at least the same relevance like the protection of the business interests. In the situation of the contemporary consumer protecting European Union Unfair Competition Law there is not only equality but even a *primacy of the consumer protection*.<sup>44</sup> A reason for this Primacy

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<sup>42</sup> See K.H. Fezer, WRP 2009, pp. 452 and 1165; K.H. Fezer in Fezer (ed), *Lauterkeitsrecht* (UWG), Edition 3, Munich, 2015, § 1 recital 28; K.H. Fezer, *Supra note* 40, 297, 300.

<sup>43</sup> K.H. Fezer & S. Koos, *Supra note* 30, recital 395.

<sup>44</sup> K.H. Fezer in K.H. Fezer (ed), *Lauterkeitsrecht* (UWG), Edition 3, Munich, 2015, § 1 recital 26; the EU-Unfair Competition Law is separated in a competitor protecting and a consumer protecting part. While the consumer protecting Unfair Competition Law is fully harmonized within the EU by the Unfair Commercial Practices Directive (Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council), the competitor protecting Unfair Competition Law is only in parts harmonized, due to different competences in the Directorate-General at the European Commission; on the UCP-

of the consumer protection within the system of the Unfair Competition Law can be seen in the fact that Unfair Competition Law is Social-Institutional Protection and that the consumer protection as purpose of the Unfair Competition Law was developed exactly out of the institutional understanding of the Unfair Competition Law, contrary to the protection of the entrepreneurial economic interests of competitors.

A third aspect is a direct consequence of the functional view of the consumers role in the competition process. A consumer protection system which emphasises the function of the consumer as 'decider' about market adequate commercial performance must be well informed. Therefore, effective consumer information is crucial for the functionality of the system. Consumer protection has necessarily to be flanked by a strong and effective information supply to the consumers. This means more than only prevention against misleading information or other active hazards for the consumer sovereignty. It means *active rights of the consumers* to get all relevant information about products and related aspects. This leads to a balancing act between the interests of the traders, not to talk their own offers down – advertising is an entrepreneurial right and equally entrepreneurial achievement and this cannot simply be sacrificed in favour of a overstretched consumer protection – and of the right of the consumers to be informed. Consequently, consumers should have an own *subjective right* against traders to get concrete and substantial information about products to achieve the best possible effective enforcement of the consumers right to be informed.<sup>45</sup>

A further consequence of the social-institutional role of the consumer is, that the single consumer is not the relevant consumer for the consumer protection law within the Unfair Competition Law, because the individual consumer is not relevant for the competition process. Consumer protection infringements must be defined with the standard of an *average consumer*. The European Unfair

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Directive see van Boom/Garde/Akseli (ed.), The European Unfair Commercial Practices Directive – Impact, Enforcement Strategies and National Legal Systems (Farnham/UK 2014).

<sup>45</sup> S. Koos in Fezer (ed), *Lauterkeitsrecht (UWG)*, Edition 3, Munich, 2015, § 9 recital 3 and in *Proceedings of the International Conference on a Developing Legal System to Promote Social Welfare*, August 23./24. 2017 Trisakti University Jakarta, p. 11.

Competition Law is applying since the middle of the 1990 years a normative<sup>46</sup> reference consumer model. Relevant is not a particular vulnerable and bad informed, nor a particular clever and experienced consumer. Relevant is the fictive typological model of an average, reasonably well informed and reasonably observant and circumspect consumer.<sup>47</sup> However, as stated before, it is not self-understanding that this reference consumer model can be simply transferred to the Indonesian situation.

## Conclusion

Is the reception of the described concept of a social-institutional Unfair Competition Law and especially the concept of a social-institutional consumer protection an appropriate concept for a possible revision of the Indonesian Consumer Protection Code, bearing in mind the special social and economic situation in Indonesia? This should be sketched in three concluding theses. To complete the whole picture, however, it would be necessary to analyse the special framework conditions in Indonesia, additionally by support of empirical studies.

*First:* As the social and cultural situation within the Indonesian archipelago is very heterogenous, the concept of the reference consumer has to be at least adapted to the peculiar situation in Indonesia. The concept of an average reference consumer is basically useful and necessary in case of a reception of the institutional Unfair Competition Law in Indonesia. However, the *average* informed, critical and average circumspect consumer may be a very poor informed consumer as there is not yet implemented a sufficiently effective consumer information system in Indonesia. The institutions – state agencies and NGO-CPs -

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<sup>46</sup> The empirical consumer reference of the older German and Austrian jurisdiction is not relevant anymore, see H.W. Micklitz, "A Common Approach to the Enforcement of Unfair Commercial Practices and Unfair Contract Terms", in W.H. van Boom, A. Garde, O. Akseli, (eds), *The European Unfair Commercial Practices Directive – Impact, Enforcement Strategies and National Legal Systems*, Ashgate Publishing, Farnham, 2014, pp. 173 ff.; S. Koos, *Supra note*. 41, p. 13f. also on the aspect whether this reference consumer model is still a 'socially just' concept.

<sup>47</sup> ECJ Case C-470/93 (*Mars*) see (10.03.2015) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61993CJ0470> see especially ECJ Case C-210/96 (*Gut Springenheide*) see (10.03.2015) [http://www.ippt.eu/files/1998/IPPT19980716\\_ECJ\\_Gut\\_Springenheide.pdf](http://www.ippt.eu/files/1998/IPPT19980716_ECJ_Gut_Springenheide.pdf).

which actually have the task of consumer information and consumer education based on Law No. 8/1999 are recently not able to fulfil this task due to organisational and budgetary reasons. This is recently not equivalent to the existing tendency within the Indonesian market to tolerate a lot of advertising practices which would rather not be tolerated in states with more homogeneous skilled consumers and also not with the lack of effective monitoring of consumer related market disturbances (see also *third*). With other words: the more the consumer information level in Indonesia is determined by rather uncritical and not sufficiently market experienced consumers, the more the *defensive* consumer protection would need to be strengthened radically.

*Second:* Due to the strong differences between the grades of education within the Indonesian population – especially between the urban population on the one hand and the rural population on the other hand – the protection level would be rather low in the sense that the Consumer Protection Law has to protect a rather weak ‘average consumer’ in the sense of a reference consumer model adapted to the particular situation in Indonesia. This will change together with the development of the rural areas in Indonesia and the growing of the Indonesian middle class and if this is the case the reference consumer model would have to be adapted to the change of the social situation. The need for protection of weakest consumers is – as it is the case in homogeneous developed markets but even more in a market with a big amount of weakly informed and critical consumers - especially strong in product areas which bear health and social danger to consumers. Gaps in the consumer protection in those product areas cause special social risks to the society (i.e. health costs or impoverishment). Here in any case the weakest consumers should be protected, regardless of an adaption of the reference consumer method.

*Third:* As already stated under the first point, we still face a striking lack of consumer information in Indonesia, which has to be changed by the implementation an effective system of consumer protection as functional protection of competition. One of the first measurements in order to modernise and effectuate the consumer protection and the Unfair Competition Law in

Indonesia is from our perspective not only the development of the consumer knowledge. We already see a relatively modern Act on Consumer Protection in the Indonesian law. However, no legal development of the Indonesian Consumer Protection Law will be effective if there is no effective monitoring of infringements of the consumers interest and no effective enforcement of the law. Necessary will be the decision by which instruments consumer protection in Indonesia should be monitored and enforced. In Indonesia seems to be a preference for an administrative way of consumer protection.<sup>48</sup> If this should remain the model for Indonesia in the future there must be implemented a stronger Consumer Protection Authority with more effective powers as it is for the time being. Furthermore, Consumer Protection Associations need significantly more support by the state to be more effective in monitoring infringements.

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<sup>48</sup> In the European Union the Unfair Competition Consumer Protection is enforced in different ways within the different member states. In some member states, such as Romania, the consumer protection is competence of a consumer protection authority, while i.e. in Germany a private enforcement by competitors and consumer protection associations is implemented.

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